Brief for Respondent for Petitioner

Filed Dec 30, 1899.

SUPREME COURT

UNITED STATES

OCTOBER TERM, 1899

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation,
Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTIAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff in Error,

vs.

WALTER B. ALLEN, AS ADMINISTRATOR OF THE ESTATE OF SAMUEL B. STEWART, DECEASED,
Defendant in Error.

BRIEF OF RESPONDENT IN ERROR

Frederick Bancroft

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Attorneys for Respondent.

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ON THE PETITION FOR THE WRIT.

The respondent respectfully suggests to the court that while, under the law, certiorari is a permissible writ, as stated by the petitioner, yet this court will be "chary of action in respect to certioraris." As was stated by this court, speaking

through Mr. Justice Brewer, in Forsythe vs. City of Hammond, 166 U. S., 506:

"That while this power is co-extensive with all possible necessties and sufficient to secure to this court a final control over the litigation in all the courts of appeal, it is a power which will be sparingly exercised and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise."

See also Am. Con. Co. vs. J. T., etc., Ry. Co., 148 U. S., 372; The Three Friends, 166 U. S., 1; Chicago, etc., Ry. Co. vs. Osborne, 146 U. S., 354; Lau Ow Bew vs. U. S., 144 U. S., 47; In re Woods, 143 U. S., 202; U. S. vs. Swan, 65 Fed. Rep., 647.

We submit that there are no facts connected with this case which should actuate the court in granting a writ. There are no conflicting decisions "between two or more courts of appeal," or "between the courts of appeal and the courts of a state," nor is there any matter involved "affecting the interests of this nation in its internal or external relations."

We contend that the decisions are uniform upon the propositions involved. The decision in the case of Roseplanter vs. Prov. L. Ass. Soc., 96 Fed., 721, referred to by petitioner, in nowise conflicts with the decision of the court of appeals in

this case. The mere fact that a number of suits involving the same question are pending should not affect this court, for the reason that it does not appear that the decisions in the cases will be conflicting. If this court should issue the writ simply because of the amount involved, and the number of suits pending, the reason for constituting the Circuit Court of Appeals, and for making its decisions final, in certain cases, would be circumvented.

In the case at bar the amount involved is less than six thousand dollars, and the decision announced by the lower court does not conflict with the decision of any other court.

The writ should be refused.

ON THE MERITS.

The questions involved in this case are:

(1) Whether the law of the State of New York relating to insurance companies, which provides that "No life insurance company doing business in the State of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of non-payment of any annual premium, or interest, or any portion thereof, except as hereinafter provided," and which provides that whenever any premium due upon any policy shall remain unpaid when due, a notice stating the amount of such premium, the place where the same should be paid, the person to whom the same is payable, be addressed and mailed to the assured, which notice shall state further, that unless said premium is paid within thirty days after the mailing of such notice, said policy shall become

forfeited and void, and providing further that a similar notice, issued prior to the maturing of said premium, shall have the same effect as one served subsequently, applies to policies of insurance issued to non-residents of the State of New York, or whether the same is limited to policy holders residing in the State of New York;

(2) Whether the policies sued on in this case were controlled by the law of New York;

(3) Whether the insurance company and the assured may waiive the provisions of the law; and

(4) Whether in suing upon a policy governed by the laws of New York it is necessary for the plaintiff to allege affirmatively the fact that no notice was given, or whether he may allege due performance on his part, and recover unless the defendant can affirmatively show compliance with the law as to notice and forfeiture of the policy.

We will present these questions briefly in the order mentioned above.

ARGUMENT.

I.

THE LAW OF THE STATE OF NEW YORK APPLIES TO ALL CONTRACTS OF INSURANCE MADE BY COMPANIES ORGANIZED IN SAID STATE, WHETHER SAID POLICIES ARE ISSUED TO RESIDENTS OR NON-RESIDENTS THEREOF.

A corporation has no power except such as is given it by

the state which gave it being. It is a creature of legislation and may be endowed with such powers as its creator sees fit to give. It does not enlarge these powers by transacting business with persons residing out of the state nor by transacting business in other states. Wherever it goes it carries with it its charter and the laws of its existence, and when a corporation goes into a foreign state and is permitted to do business therein without limitation, express or implied, it goes therein as it has been incorporated. As was said by the Supreme Court of Maryland in McKim vs. Glen, 66 Md., 484, 8 Atl., 130:

"It is a familiar principle, that a corporation and all who deal with it are bound by the law of its creation, and all such laws as may be legitimately prescribed for its government by the sovereign authority from which it derived its corporate existence."

As we understand it, this principle of law is firmly settled.

Insurance Company vs. Ficklin, 74 Md., 172; s. c. 21 Atl., 680.

Hebb vs. Insurance Company, 138 Pa. St., 174.

Rue vs. Ry. Company, 74 Tex., 479; s. c. 8 S. W., 533.

Gunn vs. Miller, 26 S. W., 280.

Relfe vs. Rundle, 103 U. S., 222.

Canada R. R. Company vs. Gebhard, 109 U. S., 527.

Black vs. Canal Company, 22 N. J. Eq., 422.

This court, in Canada R. R. Co. vs. Gebhard, supra, says:

"A corporation must dwell in the place of its creation, and cannot migrate to another sovereignty, Bank vs. Earle, 13 Pet., 588, though it may do business in all places where its charter allows and the local laws do not forbid. R. R. Co. vs. Koontz, 104 U. S., 12. But wherever it goes for business it carries its charter, as that is the law of its existence, Relfe vs. Rundle, 103 U. S., 226; and the charter is the same abroad that it is at home. Whatever disabilities are placed upon the corporation at home it retains abroad, and whatever legislative control it is subjected to at home must be recognized and submitted to by those who deal with it elsewhere. A corporation of one country may be excluded from business in another country, but, if admitted, it must, in the absence of legislation equivalent to making it a corporation of the latter country, be taken both by the government and those who deal with it, as a creature of the law of its own country, and subject to all the legislative control and direction that may be properly exercised over it at the place of its creation. Such being the law, it follows that every person who deals with a foreign corporation impliedly subjects himself to such laws of the foreign government, affecting powers and obligations of the corporation with which he voluntarily contracts, as the known and established policy of that government authorizes. To all intents and purposes, he submits his contract with the corporation to such a policy of the foreign government, and whatever is done by that government in furtherance of that policy, WHICH BINDS THOSE IN LIKE SITUATION WITH HIMSELF, WHO ARE SUBJECTS OF THE GOVERNMENT, in respect to the operation and effect of their contracts with the corporation,

will necessarily bind him. He is conclusively presumed to have contracted with a view to such laws of that government, because the corporation must of necessity be controlled by them, and it has no power to contract with a view to any other laws with which they are not in entire harmony. It follows, therefore, that anything done at the legal home of the corporation, under the authority of such laws, which discharges it from liability there, discharges it everywhere."

And again:

"Every citizen of a country, other than that in which the corporation is located, may protect himself against all unjust legislation of the foreign government by refusing to deal with its corporations."

In Pennsylvania there is a law which requires insurance companies to have attached to the policy a copy of the application, and which provides, that if it is not so attached, it will not be received in evidence. P. L. 20, Act of May 11, 1881.

In Hebb vs. Insurance Company, supra, in construing this law the Supreme Court of Pennsylvania held that it applied not only to "Policies on lives and property of persons within this commonwealth," but to policies issued by Pennsylvania companies on lives and property without the state.

The highest court of the State of New York has held that such was the meaning of the Act.

Carter vs. Insurance Company, 110 N. Y., 15.

Baxter vs. Insurance Company, 119 N. Y., 450.

In these cases the facts stated do not show the residence of the parties, but they must have been non-residents, otherwise the question of the application of the statute would not have arisen.

Plaintiff in error calls attention to the fact that the wording of the Act is, "No life insurance company *doing business in the State of New York* * * *." We submit that the Act was so worded to include not only corporations formed in New York, but foreign corporations doing business therein.

II.

THE POLICIES SUED ON IN THIS CASE WERE GOVERNED BY THE LAWS OF NEW YORK.

We contend that the law of New York relating to the forfeiting of policies controls the policies sued on not only because of the fact that the law of the State of New York was binding upon the company and entered into all of its contracts as a part thereof, as stated above, but for the further reason that the policies were New York contracts. The application for the policies stated that they were to be issued and governed by the law of the State of New York. (Petitioner's brief, p. 13.) The application was made to the company at its home office in New York; the policies were issued in New York; all premiums were due and payable at the home office in New York; the loss was payable at said office, and the proofs of death were to be made there. An inspection of the policies will show that the policies were considered by both parties as being New York contracts. We call the court's attention to the following statements contained in the policies:

"In consideration of the application for this policy, which is hereby made a part of this contract, the Mutual Life Insurance Company of New York promises to pay at its home office in the City of New York * * * upon acceptance of said proofs at its home office."

Again:

"The annual premium * * * shall be paid in advance on the delivery of this policy, and thereafter to the Company, at its home office in the City of New York."

Again:

"In witness whereof the said Mutual Life Insurance Company of New York has caused this policy to be signed by its President and Secretary at its office in the City of New York."

"Paid-up Policy.—After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the amount required by the provisions of the Act of May 21, 1879, chapter 347, Laws of the State of New York." (Record, p. 6.)

And lastly:

"The Company declines to notice any assignment of this policy until the original assignment * * * shall be filed in the Company's home office."

The policies were prepared by the Company, and recog-

nizing the force of the statute, it attempted to evade it by the following clause: "Notice that each and every such payment due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notiice required by any statute is thereby expressed waived."

These facts clearly show that the contracts were New York contracts and the parties so considered them. They were not only issued in New York, but every act of performance was to be performed there.

See London Assurance Company vs. De Barriero, 167 U. S., 149, wherein this court, speaking through Mr. Justice Peckham, says:

"Under the circumstances, we think that the contract of insurance is to be interpreted according to the English law. The appellant is an English company. It made the contract in Philadelphia by its agents, and that contract by its terms was to be performed in England. The parties to it understood and agreed that in case of loss or damage to the interests insured the same was to be reported to the corporation at London. * * *"

In the case of Andrews vs. Pond, 38 U. S., 13 Pe., 65, this court, speaking through Chief Justice Taney, says:

"The general principle in relation to contracts made in one place to be executed in another is well settled. They are to be governed by the law of the place of performance."

See also Insurance Company vs. Nixon, 81 Fed., 796, wherein the Circuit Court of Appeals for the Ninth Circuit,

speaking through Judge Ross, says, in referring to a similar contract:

"The place of its making, as well as the place of its performance, being the State of New York, there is no room for doubt that it is governed by the law of that state."

In that case as in the case at bar application was made and the policy was actually delivered, in the State of Washington.

That case was referred to and approved by the same court in The Eq. Life Insurance Company vs. Trimbell, 83 Fed., 85.

See also:

Wayman vs. Suthard, 10 Wheat., 48.

Prichard vs. Norton, 106 U. S., 124, 136, 141.

Bank vs. Hume, 128 U. S., 128.

Coghlan vs. R. R. Co., 142 U. S., 141.

Hall vs. Cordell, 142 U. S., 116.

Counsel for the petitioner cites, as holding to the contrary, the case of Rosenplanter vs. The Provident Life Assurance Society of New York, 96 Fed., 721. We submit that that case is not in conflict with our contention that the policy is governed by the law of the State of New York, but on the contrary it sustains such contention. The court holds that the contract was a New York one, and, proceeding, the court says:

"The effect of the prohibition against declaring a forfeiture of the interests of the assured under the contract was

to keep the policy alive as a valid subsisting insurance, notwithstanding the stipulations of the parties to the contrary. The duration of the policy, so long as it was dominated by the statute, was not dependent upon the payment of premiums on the day named therein, but upon payment within thirty days after the statutory notice should be given. The only way in which the policy could be terminated under the statute was by the failure of the insured to pay his premium upon notice 'mailed' thirty days before the premium was due, or by a notice of default and demand for payment within thirty days after mailing such notice. Baxter vs. Insurance Co., 119 N. Y., 450."

It will be noticed that the case of Baxter vs. Insurance Company is cited with approval.

The court holds that the policy is governed by the law of New York. That is what we contend for in this case. In that case, however, the policy was a term contract for one year, and the court held that the law of 1892 did not include such a policy.

THE AMENDMENT OF 1897 DOES NOT AFFECT THE POLICIES IN QUESTION IN THIS CASE.

The record shows that these policies were issued in 1893; that the assured died in July, 1897; that this suit was instituted December 28, 1897. (Record, pp. 3, 8, 19.)

We contend that the provisions of the act of 1892 became a part of the contract to the same extent as if the act had been incorporated therein, and therefore that same could not be affected by subsequent amendments.

But however this may be, the amendment was not in force at the time of the death of the deceased, and the rights of the parties became fixed at that time.

Again, this suit was brought within one year after the act took effect.

III.

THE PROVISIONS OF THE NEW YORK STATUTE CANNOT BE WAIVED BY THE ASSURED OR THE COMPANY, OR BY BOTH TOGETHER.

It is a well established principle that laws in existence are referred to in all contracts made under such laws, and that no waiver of the parties, nor stipulations in the contract, can change the law.

Hermany vs. Association, 151 Pa. St., 17.

Insurance Company vs. Ficklin, 21 Atl., 680.

Insurance Company vs. Leslie, 47 Ohio St., 409; s. c. 24 N. E., 1072.

White vs. Society, 163 Mass., 108.

Insurance Company vs. Pollard, 26 S. E., 421.

Griffith vs. Insurance Company, (Cal.) 36 Pac., 117.

The case of Insurance Company vs. Clement, 140 U. S., 226, was a suit upon a policy of insurance which the court held was governed by the laws of Missouri. There was a statute in Missouri which prescribed the rules of commutation. There was a clause in the policy which provided a rule of

commutation different and in conflict with the statute, and a relinquishment and waiver of all "right or claim to any other surrender value than that provided, whether required by a statute of any state or not."

Yet this court, speaking through Mr. Justice Gray, said:

"It follows that the insertion in the policy of a provision for a different rule of commutation from that prescribed by the statute * * * as well as the insertion in the application of a clause by which the beneficiary purports to 'waive and relinquish all right or claim to any other surrender value than that so provided, whether required by a statute of any state or not,' is an ineffectual attempt to evade and nullify the clear words of the statute."

The case of the Mutual Life Insurance Company vs. Robinson, 54 Fed., 580, cited by the petitioner on page 18 of its brief, so holds, the court saying: "We are then justified in holding that so far as the Iowa statute above quoted may apply to the contracts of insurance at bar, the Iowa law is the law which is to govern and furnish the rule of construction, *'anything in the application or policy to the contrary notwithstanding, and a waiver thereof as claimed by plaintiff is ineffectual.'* "

The case of Rosenplanter vs. Prov. L. Assur. Soc., 96 Fed., 721, cited by petitioner, and so strenuously relied upon by it, also sustains this contention, the court saying:

"The effect of the prohibition (of the statute) against declaring a forfeiture of the interests of the assured, under the

contract, was to keep the policy alive, as a valid, subsisting insurance, *notwithstanding the stipulations of the parties to the contrary.*"

It should need no argument to show the correctness of this rule. Statutes would be very ineffective if they could be defeated by contracts. The Legislature of the State of New York enacted a rule for the regulation of insurance companies and stated in what manner and under what circumstances they could declare their contracts forfeited. This matter is one of public interest and concern, and insurance companies should not be permitted, under the guise of an agreement, to forfeit contracts in a different manner from that which the Legislature outlines. It is against public policy to permit persons natural or artificial to evade, set aside or annul public statutes by contracts, and we know of no authority which sanctions it.

IV.

IN SUING UPON A POLICY THE PLAINTIFF MAY ALLEGE FULL PERFORMANCE UPON THE PART OF THE ASSURED AND NEED NOT SET FORTH NON-RECEIPT OF THE NOTICE REQUIRED BY THE NEW YORK STATUTE. THAT THE NOTICES WERE GIVEN AND THE POLICIES LEGALLY FORFEITED IS A MATTER OF DEFENSE.

The petitioner contends that as the respondent in his complaint alleged full compliance on the part of the insured and the plaintiff, it was a departure from law to law to permit a recovery because of non-failure of the defendant to

give the notice and to forfeit the policy in the manner provided by the New York statute. Plaintiff in error relies upon the case of the Union Pacific Ry Company vs. Wyler, 158 U. S., 285, as sustaining its position in this regard. We submit that that case is entirely different and is easily distinguished from the case at bar. That was an action in tort. This is one upon contract. That suit was originally commenced in a state court of Missouri, which did not take judicial notice of the statutes of sister states. In the petition as filed the plaintiff sought to recover for an injury sustained by reason of the acts of an incompetent servant of the defendant whom the defendant had retained in its employ after knowledge of his incompetency. The injury occurred in Kansas, and the petition was drawn upon the theory of the common law liability of negligence. The suit was afterwards transferred to the United States court, and a demurrer being filed to the petition, was sustained with leave to amend. Thereafter a second petition was filed which set forth that the injury was sustained by reason of the negligence of one of the defendant's servants, who was a fellow servant of the plaintiff, and rested the cause of action exclusively upon the negligence of a fellow servant of the plaintiff. But alleged further that by virtue of a Kansas statute every railway company doing business in that state was liable for damages sustained in consequence of any negligence of a fellow servant. The common law liability for damages sustained because of the retaining by the master in its employ of an incompetent servant with knowledge of his incompetency, was eliminated entirely. To this amended petition a demurrer

was filed upon the ground that the action had not been commenced within the time limited by law, and the court held, in determining whether the action was barred by the statute of limitations, that the action should be deemed commenced from the date of the filing of the amended petition, holding that a suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce a claim for damages caused by the negligence of a fellow servant which the common law did not permit but which was given by the statute of Kansas. The court saying:

"As the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other states are treated as foreign laws, which must be pleaded and proven. (Citing authorities.) Although this rule is not invariably adhered to, it is part of the law as administered in the State of Missouri. Babcock vs. Babcock, 46 Mo., 243. The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state."

The court will notice that in the first petition no reference was made to the Kansas statute, nor was there any reference to the fact that injury was occasioned through the negligence of a fellow servant.

Suppose that in the first petition the plaintiff had set forth that he was injured by the acts of an incompetent servant of

his master, who had been retained by the master with knowledge of his incompetency, and then had proceeded and alleged that such servant was a fellow servant and that the plaintiff had been injured through the negligent acts of such fellow servant, and setting forth by proper plea the Kansas statute, would the court have held that there was any departure? We think not.

In the case at bar the plaintiff, defendant in error, set forth in his complaint the fact that the defendant was a New York corporation, the entering into the contracts of insurance, copying such contracts in haec verba, and the suit was originally instituted in the United States Court, which takes judicial notice of the public laws of all of the states of the Union. And we submit that the complaint stated a prima facie case and that it was for the defendant to plead affirmatively the facts showing a forfeiture, if any there were.

It is not necessary to plead, either by reference or by copy, the law of the State of New York. The doctrine that United States Courts take judicial notice of the laws of the several states of the Union, and that in actions in such courts it is unnecessary to plead or prove such laws, is firmly established.

Lamar vs. Micou, 114 U. S., 218.
Hanley vs. Donohue, 116 U. S., 1.
Bank vs. Franklyn, 120 U. S., 747.
Gormuley vs. Bunyan, 138 U. S., 623.
Merchant's Bank vs. McGraw, 59 Fed., 972.
Newburn vs. Robinson, 36 Fed., 841.

L'Engle vs. Gates, 74 Fed., 513.
Owens vs. Hull, 9 Peters, 607.
Ellwod vs. Flennegan, 104 U. S., 562.

The complaint should be construed therefore as though the New York statute had been incorporated in it.

Again, as we have shown above, it appeared from the complaint that the contracts of insurance were New York contracts. The New York statute therefore entered into and became a part of them, and they were governed thereby. This has been held repeatedly by a number of courts.

Baxter vs. Ins. Co., 119 N. Y., 450.
Defrece vs. Ins. Co., 136 N. Y., 144.
Osborne vs. Ins. Co., (Cal.) 87 Pacific, 616.
Griffith vs. Inc. Co., 101 Cal., 621.
Warner vs. Ins. Co., 100 Mich., 167.
Ins. Co. vs. Mullen, 34 Southwestern, 605.
Nixon vs. Ins. Co. (C. C. A.), 81 Fed., 796.
Phinney vs. Ins. Co., 67 Fed., 494.
Rosenplanter vs. Ins. Co. (C. C. A.), 96 Fed., 721.

If these authorities control, and we submit that this court, under the universal rule, should follow the construction placed by courts of different states upon their own statutes, it was not necessary for the defendant in error to plead any fact other than what was contained in his complaint.

The fact, if it was a fact, that the policies had been forfeited or that the assured had violated the contract, were matters of defense. It is generally held that parties do not have

to plead negative allegations, nor do they have to anticipate defenses and deny them in advance.

Canfield vs. Tobias, 21 Cal., 349.

Uhl vs. Harvey, 78 Ind., 26.

Dunlavey vs. Watson, 38 Ia., 398.

The allegations in the complaint, of which the plaintiff in error complains, are as follows.

"That he, the said Samuel B. Stewart, did during his lifetime do and perform all agreements, which, under said policy of insurance, he was obliged to do and perform." (Transcript, p. 9.) And further:

"That the said plaintiff has done and performed all acts and things necessary to be done and performed by him under and by virtue of said policy and contract of insurance." (Transcript, p. 10.)

We submit that these allegations were legally true, because, as we have seen, the law of the State of New York entered into and became a part of the policy—the policies were governed thereby—and there was no breach of the conditions of the policy by the assured until the defendant had fulfilled the requirements of the act. The insured is not considered in default until he has received the notice required by the act to be given him. In these statements we are borne out by the Court of Appeals of New York in construing the very statute which is now before the court. We again say that this court and all other courts, in construing the New York

statute, should give to such statute that construction which the highest court in New York gives it.

In Baxter vs. Insurance Company, 119 N. Y., 450, the complaint was based upon an insurance policy issued by a company doing business in New York, and the complaint contained an allegation that the insured had made payment of premiums acording to the terms of the policy, while in fact the plaintiff had not made such payments. An inspection of brief of counsel for appellant therein will show that the question was made by the insurance company that the plaintiff having alleged due performance and payment of all the premiums was not entitled to recover without proving the allegations as alleged. The same point as is raised by the plaintiff in error here.

In deciding the case, the court says, referring to the statute, p. 454:

"This statute was a part of the contract in question and governed the rights and obligations of the parties in precisely the same way and to the same extent as if all its terms and conditions had been actually incorporated into the policy. * * * (p. 455.) It is obvious that the statute, when imported into the contract, modified its condition in very material respects. The duration and validity of the policy is not then dependent upon payment of the premium on the day named therein, but upon payment within thirty days after the notice had been given. The condition upon which the policy can be forfeited, or in any way impaired as a subsisting contract of insurance, is a failure on the part of the insured to

pay the premium within thirty days after notice. The complaint alleges that the insured, after the time of the death, made the payment on the policy as agreed with the defendant. That he actually paid the premium necessary to keep the policy in life till the 24th of August prior to his death, was established and admitted. *It was not necessary to prove that he also paid the premium on the 24th of August, because the contract was not impaired by a failure to pay on that day* but by a failure to pay within thirty days after the defendant had served the statutory notice. THE STATUTE PRESCRIBES THIS NOTICE AS A NECESSARY CONDITION OF FORFEITURE, and unless it was served the insured was not in default, because payment within thirty days after notice is to be taken as a full compliance with the conditions as to payment of premium. *In the absence of proof, on the part of the defendant, as to the service of the notice, this allegation of the complaint was sufficiently established within the meaning of the contract, as evidenced by the policy and the statute when read together."*

Petitioner criticises this case, yet the case of Rosenplanter vs. Insurance Company, 96 Fed., 721, relied upon by it, cites it with approval.

In Defreee vs. Insurance Company, 136 N. Y., 144, the same doctrine is reiterated and affirmed.

In the case of Mullen vs. Insurance Company, 34 S. W., 605, the Supreme Court of Texas in construing this New York statute and the effect of an allegation in the complaint of full performance, when in fact the payments had not been made.

says, after referring to Baxter vs. Insurance Company, supra:

"Viewed in the light of this construction, which this court must accept, it would seem that the plaintiff in error only alleged in his petition what was legally true, and only what was necessary to show a right to recover. While it is true that he failed to pay two of the matured premiums before his wife's death, yet, in the absence of notice, such failure had no effect upon his legal rights in the premises, and did not constitute a breach of his obligation to pay premiums."

The allegation in the complaint was, "That plaintiff and his wife (who was insured) had entirely and fully complied with the terms of their agreement in making the payments upon the said policy of the defendant."

We submit that upon a contract of insurance made in the State of New York, or one governed by the laws of New York, it is necessary, in order to make out a prima facie case, to prove only the contract, the death of the insured, proofs of death, the appointment of the executor, demand for payment, and that in the absence of any other proofs, the plaintiff would be entitled to recover. If this be so, and we do not think it will be disputed, it is not necessary to allege any further facts, for the allegations need be no larger than the proofs required, and other allegation than what is required to be proved is mere surplusage, and being so, a denial thereof raises no issue.

In the case at bar would it be contended for a moment that the plaintiff, in order to make out a prima facie case, would have to prove that no notice as required by the New

York statute was given him? Or would not the proof of the contract, proof of death, proofs of loss, demand for payment and the appointment of the plaintiff as executor, all of which were admitted, be all that was required until the defendant had shown a compliance with the New York statute as to giving notices of the due date of the premium? If the latter, then it was not necessary for the plaintiff to allege the failure to give the notice, and such allegation would be immaterial and a denial thereof would raise no issue.

The plaintiff in error contends that the case should have been submitted to the jury upon the issue formed by the general denials. The denial referred to by the appellant in error is the denial of the due performance on the part of the insured and defendant in error. These allegations were immaterial ones, were surplusage, and the denial thereof raised no issue whatever. The statute being a part of the contract—the contract being governed thereby—it was immaterial whether the premiums had been paid, until it was shown that the notice required by the statute had been given. Whether this notice had been given was solely within the knowledge of the company. The insured was dead. It was impossible for defendant in error to have shown that the deceased had never received the notice. We submit that if the matter had been submitted to a jury on this denial, proof on part of defendant in error of the fact that no notice had been given would not have been necessary until the company had shown affirmatively that one was given. The non-payment of premium did not work a

forfeiture—but a non-payment after due notice given as by statute required.

The making and delivery of the contracts, payment of first annual premium, death of insured, plaintiff's appointment as executor, furnishing of proofs of death, and demand for payment were all admitted.

The defendant in this case did not in either of the affirmative defenses claim or attempt to plead that it complied or attempted to comply with the New York statute. An inspection of the affirmative defenses will show that the facts alleged constituted no defense to the policies or either of them, and we think the demurrers thereto were rightfully sustained.

We respectfully submit that the judgment should be affirmed.

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